Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

## No. 76-1404

TERRANCE E. DOWNEY,
Petitioner,

versus

THOMAS CALLERY, Et Als.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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The respondents, Thomas R. Callery, Walter M. Rovenski, Francis J. Clancey, Gregory Buckley, Edwin J. Herpich, H. F. Garrett and Employers Liability Assurance Corporation, Ltd., oppose the petition for writ of certiorari on the following grounds:

## 1. THE UNITED STATES SUPREME COURT DOES NOT GRANT WRITS OF CERTIORARI TO STATE COURTS WHERE FEDERAL CONSTITUTIONAL QUESTIONS WERE NOT TIMELY RAISED IN THE STATE COURT PROCEEDINGS.

Although the petitioner herein attempts to raise questions of denial of rights guaranteed to him by the Fourteenth Amendment of the Constitution of the United States, these denials of rights were not validly raised in the State Courts of Louisiana. Specifically no pleading or argument concerning the denial of any Fourteenth Amendment rights were made in the Fourth Circuit Court of Appeals for the State of Louisiana or in the Petition For Writ of Certiorari or Review filed with the Supreme Court of the State of Louisiana. The Supreme Court of the State of Louisiana refused to grant writs of certiorari or review and it was only at that point in an application for a rehearing of the petition for writ of certiorari or review did the petitioner mention a violation of any Fourteenth Amendment rights. However, under the law of Louisiana, petitioner did not have a right to have a rehearing considered from the mere denial of writs and the Louisiana Supreme Court did not consider his application for a rehearing. The Court said in its decree "Not considered: Applications for rehearing not considered as to mere denials of writs. La.Sup.Ct., Rule 9, Section 6."

Since the Louisiana Constitution of 1974 in Article V, Section 5 grants to the Supreme Court of Louisiana a rule making power the provisions of Louisiana Supreme Court, Rule 9, Section 6 bars an application for a rehearing from a denial of writs. Therefore the



plaintiff did not make a timely claim of his Fourteenth Amendment rights.

In addition, petitioner, in his application for writs in the United States Supreme Court, did not abide by the provisions of Rule 23 (1)(f) of this Court which require that he specify the stage at which and the manner in which the Federal questions sought to be reviewed were raised in the courts below, the method of raising them and the way in which they were passed upon by the Court. His application also failed to contain pertinent quotations from the record to show that the Federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari in violation of Rule 23 (1)(f) of this Court.

In *American Surety Company v. Baldwin*, 53 S.Ct. 98, 287 U.S. 156, an application for certiorari to the Supreme Court of Idaho was considered. The petitioner had urged for the first time in his petition for a rehearing in the Supreme Court of Idaho that the judgment violated the due process clause of the Fourteenth Amendment. The Court rejected the application stating there had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. The Court held that the untimely Federal claim could not serve as a basis for review by the United States Supreme Court. See also *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S.Ct. 2358 (1976) and *Fuller v. Oregon*, 94 S.Ct. 2116, 416 U.S. 866 (1974).

## 2. DECISION OF THE SUPREME COURT OF LOUISIANA TO DENY PETITIONER'S APPLICATION FOR WRITS DID

## NOT INVOLVE AN IMPROPER RETROACTIVE APPLICATION OF A STATE STATUTE.

The petitioner argues that one of the four Justices gave as a basis for his denial Act 147 of the Louisiana legislature of 1976.

Justice Summers concurring in the denial of the application for writs said "I am of the opinion Canter v. Koehring, 283 So.2d 716 (La. 1973) should be overruled. See also Act 147 of 1976, legislatively overruling Canter v. Koehring."

Respondents submit that what Justice Summers was saying was that he disagreed with the holding of *Canter* which set out the circumstances and conditions under which officers and directors of employers could be held liable to employees and by saying "See also Act 147 of 1976, legislatively overruling Canter v. Koehring" he was suggesting that the legislature also agreed that *Canter v. Koehring* was bad law and the legislature took it upon itself to overrule *Canter* by passing Act 147 of 1976. Justice Summers' statement was that *Canter* should be overruled. This could have been done by the Louisiana Supreme Court if four Justices were in agreement, it would not have required Act 147 of 1976 or any legislation whatsoever.

Therefore the reference to Act 147 of 1976 by Justice Summers was not an attempt to retroactively apply that act to this case.



## 3. LOUISIANA APPELLATE REVIEW DID NOT DEPRIVE PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioner complains that the Louisiana Supreme Court in *Canter v. Koehring*, 283 So.2d 716 (La. S.Ct., 1973), established a rule that the findings of the trier of fact are not to be disturbed by the appellate court without a finding of "manifest error" and he claims that the Louisiana Court of Appeals for the Fourth Circuit in this case reversed without finding manifest error.

First, in its per curiam on application for rehearing, Page 21A of petitioner's petition the Louisiana Fourth Circuit gave a full explanation of this ruling saying that the record was devoid of any evidence to establish some of the findings of the trial judge and that the trial judge in his reasons for judgment did not reach at all a consideration of some facts essential to a determination of this case. The Court of Appeals in those instances made affirmative findings and in applying those factual determinations to the law reached a conclusion of the case different from that of the trial judge. Therefore the Court of Appeals did not violate the ruling of the Louisiana Supreme Court in *Canter v. Koehring*, supra.

Apparently the Louisiana Supreme Court agreed that the rule of *Canter v. Koehring* was not violated because the plaintiff's application for writs of certiorari were denied.

Secondly, even if the Court of Appeals violated the rule of *Canter* requiring a finding of manifest error to

reverse the trial court, this rule was a rule judicially established by the Louisiana Supreme Court and the rule could or can be changed by the Louisiana Supreme Court at any time. If the rule was violated then the refusal of the Louisiana Supreme Court to grant writs operates as a change in the Louisiana Supreme Court's own rule and is a permissible exercise of the Louisiana Supreme Court's authority and is not violative of the due process clause of the United States Constitution and does not entitle the petitioner to review by this Court of the decision of the Louisiana Courts.

## CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

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## CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing opposition upon the following attorneys:

1) Mr. Stephen C. Kogos
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by mailing the same to them at the addresses indicated above by U. S. Mail, first class, postage pre-paid, this ____ day of May, 1977.

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JAMES S. ARCENEAUX